

RAPHAEL PURA

a

v.

INSAS BHD & ANOR

COURT OF APPEAL, KUALA LUMPUR

b

AHMAD FAIRUZ JCA

MOKHTAR SIDIN JCA

DENIS ONG JCA

[CIVIL APPEAL NO: W-02-662-1999]

16 NOVEMBER 2000

c

CIVIL PROCEDURE: Judge - Judge to recuse himself - Defamation action settled out of court upon defendant admitting that statements in article untrue - Judge stated that this showed statements in article untrue - Whether judge ought to recuse himself from hearing and determining present suit based on same article - Whether judge ought to do so although words complained of in earlier suit different from words complained of in present suit - Whether suspicion that fair trial not possible arose

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CIVIL PROCEDURE: Judge - Judge to recuse himself - Judge making critical statements against person upon finding him guilty of contempt - Whether judge ought to recuse himself from hearing and determining suit wherein same person called as witness - Whether real danger that such person's testimony would not be received with an open mind

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As a result of the publication of an article alleging, *inter alia*, that certain lawyers acting for the plaintiffs in named suits had improperly sought to obtain favours from judges, six suits grounded on defamation including suit No. S2-23-42-96 ('the suit') were filed. The five other defamation suits were settled out of court and the defendants thereto informed the court of the settlement by reading a statement in open court to that effect. The settlement was reached after the defendants tendered an unreserved apology and admitted that their statements in the article were false and untrue. The court recorded the settlement and went on to say, *inter alia*, "It is now clear that the open court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words ..."

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Subsequent to the settlement, however, one of the defendants ('the defendant') issued a press statement to the effect that the settlement "was initiated, brokered and insisted upon by the insurers." This led to the

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a defendant being found guilty of contempt of court. In his written judgment, the trial judge made certain comments of the defendant for acting as he had done.

b Just before the hearing of the suit, the appellant orally applied for the trial judge to recuse himself from hearing and determining the suit as he was the same judge involved in recording the settlement and in finding the defendant guilty of contempt of court. This application was dismissed and hence the instant appeal.

c The appellant contended that the statement made by the court subsequent to recording the settlement to the five suits was at the heart of the appellant's defence of justification, fair comment and qualified privilege. The appellant also argued that the said statement of the court went to issues and questions for the determination of the trial judge in the suit. This, according to the appellant, indicated an apparent prejudgment by the judge of the appellant's claim.

d The appellant further argued that since the defendant was scheduled to be called as a witness for the appellant in the suit, the written judgment relating to the action for contempt would give rise to a perception on the part of the public that there would be a real danger that the defendant's testimony in the suit would not be received with an open mind by the trial judge.

Held:

Per Ahmad Fairuz JCA

f **[1a]** The judge's statement upon recording the settlement to the five other suits could not have any bearing upon the suit as the defendants to the five suits apologised for their defamatory statements and admitted that their statements were false and untrue. Further, the words complained of and attributed to the defendants in the five suits were not the same as the words complained of and attributed to the appellant in the suit.

g **[1b]** The judge's statement upon recording the settlement was made purely upon the unreserved apology tendered by the defendants in the five suits. This statement was made in the context of the statement in open court made by the defendants in the five suits. Thus, a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have no ground to suspect that a fair trial would not be possible.

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[2] As to the test for bias, the learned trial judge had rightly applied the “real danger test”. Just because the defendant was found guilty of contempt could not render the defendant’s evidence in the suit unacceptable. The truth of what the defendant might say in evidence would be tested by cross-examination. Evidence would be given and recorded in open court and the court would only decide with an open mind, based on the evidence given. a
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[2a] The view held by Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) v. Yong Liuk Thin* that a same judge may, after expressing a view in the course of an interlocutory proceeding, quite properly after hearing the main action, come to the opposite conclusion ought to apply to the learned trial judge’s comments on the defendant in his contempt of court matter. c

[Appeal dismissed with costs.]

[Bahasa Malaysia Translation Of Headnotes] d

Akibat penerbitan satu rencana yang mendakwa, antara lainnya, bahawa terdapatnya peguam-peguam tertentu yang bertindak untuk plaintif dalam guaman-guaman yang dinamakan telah secara tidak wajar cuba mendapatkan kerjasama daripada hakim-hakim, enam guaman yang diasaskan pada memfitnah termasuk Guaman No. S2-23-42-96 (‘guaman tersebut’) telah difailkan. Lima guaman memfitnah yang lain telah diselesaikan di luar mahkamah dan defendan-defendan kepadanya telah memaklumkan mahkamah mengenai penyelesaian tersebut dengan membaca satu pernyataan dalam mahkamah terbuka mengenainya. Penyelesaian tersebut telah dicapai selepas defendan-defendan berterus terang memohon maaf dan mengakui bahawa kenyataan mereka di dalam risalah tersebut adalah palsu dan tidak benar. Mahkamah telah merakam kenyataan tersebut dan seterusnya menyatakan, antara lainnya “It is now clear that the open court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words ...” e
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Berikutan dengan penyelesaian tersebut walaupun bagaimanapun, salah seorang defendan-defendan (‘defendan tersebut’) telah mengeluarkan kenyataan akhbar berhubung dengannya bahawa penyelesaian tersebut “was initiated, brokered and insisted upon by the insurers”. Ini membawa kepada defendan didapati bersalah kerana menghina mahkamah. Dalam penghakiman bertulisnya, hakim perbicaraan telah membuat ulasan-ulasan tertentu mengenai defendan kerana telah bertindak sepertimana yang dilakukan olehnya. h
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- a* Sejurus sebelum perbicaraan guaman tersebut, perayu telah secara lisan memohon supaya hakim perbicaraan mengecualikan dirinya daripada mendengar dan menentukan guaman tersebut kerana beliau merupakan hakim sama yang terlibat dalam mencatatkan penyelesaian tersebut dan dalam memutuskan defendan bersalah kerana menghina mahkamah.
- b* Permohonan ini telah ditolak dan oleh itu menyebabkan rayuan semasa ini.
- Perayu menegaskan bahawa pernyataan yang dibuat oleh mahkamah berikutan dengan mencatatkan penyelesaian lima guaman tersebut terletak pada asas pembelaan perayu mengenai justifikasi, ulasan yang adil dan perlindungan bersyarat. Perayu tersebut juga berhujah bahawa pernyataan mahkamah menyentuh isu-isu dan soalan-soalan untuk penentuan hakim perbicaraan dalam guaman tersebut. Ini, mengikut perayu, menunjukkan suatu pra-penghakiman yang jelas oleh hakim mengenai tuntutan perayu.
- c*
- d* Perayu selanjutnya berhujah bahawa oleh kerana defendan dijadualkan untuk dipanggil sebagai saksi bagi perayu dalam guaman tersebut, penghakiman bertulis berhubung tindakan untuk penghinaan akan membangkitkan satu persepsi oleh orang awam bahawa akan terdapat bahaya yang sesungguhnya bahawa testimoni defendan dalam guaman tersebut tidak akan diterima dengan minda yang terbuka oleh hakim perbicaraan.
- e* **Diputuskan:**
Oleh Ahmad Fairuz HMR
- f* **[1a]** Pernyataan hakim setelah merakamkan penyelesaian kepada lima guaman lain tidak mempunyai apa-apa kaitan kepada guaman tersebut kerana defendan-defendan kepada lima guaman tersebut telah memohon maaf atas kenyataan memfitnah mereka dan mengakui bahawa kenyataan-kenyataan mereka adalah palsu dan tidak benar. Selanjutnya, perkataan yang diadukan dan dikaitkan dengan defendan-defendan kepada lima guaman tersebut bukannya sama dengan perkataan yang diadukan dan dikaitkan kepada perayu-perayu dalam guaman tersebut ini.
- g*
- h* **[1b]** Pernyataan hakim setelah merakamkan penyelesaian tersebut telah dibuat semata-mata atas pohonan maaf secara berterus terang oleh defendan-defendan kepada lima guaman tersebut. Pernyataan ini telah dibuat dalam konteksnya pernyataan dalam mahkamah terbuka yang dibuat oleh defendan-defendan kepada lima guaman tersebut. Oleh itu, seseorang yang waras dan berpatutan yang duduk di dalam mahkamah dan mengetahui kesemua fakta-fakta relevan tidak akan mempunyai alasan untuk mensyaki bahawa sesuatu perbicaraan yang adil tidak mungkin dapat dijalankan.
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- [2] Berhubung dengan ujian untuk berpihak (bias), hakim perbicaraan telah memakai dengan betulnya “real danger test”. Hanya kerana defendan telah didapati bersalah kerana penghinaan mahkamah tidak boleh menjadikan keterangan defendan dalam guaman tersebut tidak boleh diterima. Kebenaran mengenai apa yang akan diperkatakan oleh defendan dalam keterangan akan diuji melalui pemeriksaan balas. Keterangan akan diberikan dan dicatatkan dalam mahkamah terbuka dan mahkamah akan hanya memutuskan dengan minda terbuka berdasarkan keterangan yang diberikan. a
- [2a] Pandangan yang diberikan oleh Gopal Sri Ram HMR dalam *Hock Hua Bank (Sabah) v. Yong Liuk Thin* bahawa seseorang hakim yang sama boleh, selepas menyatakan pandangan dalam perjalanan sesuatu prosiding interlokutori, dengan agak sempurna selepas mendengar tindakan utama, mencapai kesimpulan yang bertentangan, seharusnya terpakai kepada ulasan hakim perbicaraan ke atas defendan dalam perkara penghinaan mahkamah beliau. b
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Case(s) referred to:

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin [1995] 2 CLJ 900 (**foll**)

For the appellant - Cecil Abraham (Muhammad Shafee Abdullah, Gurmeet Kaur & G Rajasingam with him); M/s Shafee & Co e

For the respondents - V Sivaparanjothi (S Rutheran & S Ashokvijay with him); M/s Siva & Partners

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-23-42-1996]

Reported by S Dharmendran f

JUDGMENT**Ahmad Fairuz JCA:**

On 30 August 1999, the learned High Court judge dismissed the appellant’s oral application to disqualify himself from hearing and determining the suit No. S2-23-42-96 (hereinafter referred to as “the suit”). The appellant now appeals against that decision. g

The respondents filed the suit against the appellant for damages premised upon slander and libel arising from an article entitled “*Malaysian Justice on Trial*” published in the November issue of the International Commercial Litigation magazine. The suit had undergone various stages of case management by the learned judge. On 13 August 1999, the suit was at its last stage of case management and was fixed for hearing on 1 September 1999 and 6 September 1999 to 10 September 1999. It was at this stage that the appellant orally applied for the trial judge to recuse himself from hearing and determining the suit. h

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- a* Pertaining to the abovementioned article, there were also filed five other defamation suits (hereinafter referred to as “the five suits”). The parties to the five suits reached an amicable settlement and on 21 October 1998 a statement in open court was read out, after which the learned judge, *inter alia*, said:
- b* I do not intend to narrate the facts of this case. In the normal circumstances, when a case fixed for hearing is settled the Judge makes no comments save to record the settlement and to thank counsel. But I cannot let this case pass me by with a mere recording of the terms of settlement. It is pertinent for me to express my views upon matters leading to this case.
- c* It is now clear that the open Court statement by the defendants puts paid to any suggestion that it is open to a litigant or his counsel to buy justice in this country. The unfounded and contumelious allegations made without any basis that justice is for purchase compels me to say a few words notwithstanding the magnanimous gestures of repentance by the defendants.
- d* Falsehood if continuously repeated takes on the mantle of truth. Allegations of improper conduct by the plaintiffs and their counsel in complicity with judges were the basis for these suits to have been commenced. The unreserved apology tendered herein completely vindicates the plaintiffs and their counsel and needless to say reinforces the belief that the scales of justice in this country are ever evenly balanced.
- e* It is my fervent hope that with the closure of all these cases and the amicable settlement arrived at by all parties, everyone will see the futility of ‘shooting from the hip’.
- f* Subsequent to the settlement proceeding, one of the defendants in the five suits, Tommy Thomas, issued a press statement to the effect that the settlement “was initiated, brokered and insisted upon by the insurers”. Mr. Tommy Thomas also said in the press statement that the five suits were settled despite his express objections. Mr. Tommy Thomas, however, retracted this press statement later. All these prompted the trial judge to issue, on his own motion, a notice to show cause as to why Mr. Tommy Thomas should not be cited for contempt of court. This contempt proceeding resulted in a finding of guilt and a sentence of six months’ imprisonment being imposed on Mr. Tommy Thomas. In his written judgment the trial judge, *inter alia*, said:
- h* All these actions arise out of an article published in a specialist legal journal called ‘International Commercial Litigation’ The said publication is available in many countries including Malaysia. The impugned article was a cover story entitled ‘Malaysian Justice on Trial’. The article considered in
- i* damaging terms various decisions of the Malaysian Courts in respect of

certain named cases. The gravamen of the complaint about the article in the suits by the plaintiffs was that the said article accused the lawyers acting for the plaintiffs in the named suits of complicity in, or at least connivance at improperly seeking to obtain favours from the Judges concerned in the litigation in which they were involved. ...

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It is appropriate for me at this juncture to refer to an old Roman saying:

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‘Quem deus pendere vult prius dementat’. Translated it means ‘Whom the God wishes to destroy he first makes mad’.

Mr. Tommy Thomas is a very senior member of the Bar and has been acting as lead counsel in many a leading case so often found in the law journals. He is not a fledging lawyer, unaware of the ramifications of acting in haste. I have searched through the evidence and re-read the affidavits. I have perused in detail each argument of Mr. Abraham in mitigation. The pages are full of words expressing remorse and contrition. Yet to my mind I find that Mr. Tommy Thomas has not been honest with the Court. He has in my view not come clean. His explanation that the press statement which said that ‘the actions were settled despite my express objections’ was meant for the insurers, rang so hollow that it was almost an insult to the intelligence of the Court to expect this Court to be so gullible as to accept that explanation. He was asked both by me and Dato’ Zaitun why he had to deal with the insurers through the press and even then he failed to come clean. ...

c**d****e**

To my mind it is patently clear that by making an immediate statement in the press that the settlement was effected despite his express objections, Mr. Tommy Thomas intended to portray to the world at large that he was never a willing party to the settlement. Having made disparaging and contumelious aspersions against the plaintiffs in the impugned article and having surreptitiously dragged in the judiciary into the fray, Mr. Tommy Thomas was a besotted adversary who would not sheath his sword until he had had the last say.

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But alas for him his anger and frustration has led him to his present predicament. Even to the very end he is not prepared to come clean, bare his soul and then seek the Court’s compassion. ...

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However, in this case whilst Mr. Tommy Thomas had apologized on numerous occasions, to my mind such apology is not sincere and open, but tainted with reservations. His explanation relating to notice to insurers has been rejected by this Court. ...

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His total disregard towards the feelings of the parties and the Court in faxing the press statement shows the conduct of an exasperated litigant. ...

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a Besides, in the case before me, I have found that Mr. Tommy Thomas' insistence in continuing to maintain his explanation that he had merely intended to convey his opposition to any settlement to the insurers only, was a clear indication that he was not fully and completely contrite and remorseful. There was no need to speak to the insurers through the press.

b ...

The contemnor has continued to reflect his personal desire not to be open and candid with the Court. Even on the day he was questioned by me if he had admitted truthfully his purpose for having made such a press statement this Court would have been compassionate. This attempt to insult the intelligence of the Court by giving an explanation that not even a novice

c would want to proffer is an affront to the integrity of this Court ...

The learned appellant's counsel contended that what the trial judge said (as quoted in para. 3 above), were said by him without the benefit of any evidence tendered by any of the parties to the five suits. It was urged upon us that the trial judge's statement were made in the context of the statement in open court wherein by para. 7 therein, the complaints of the plaintiffs in the five suits are similar to the matters pleaded in the respondents' statement of claim. The appellant stressed that the matters in the trial judge's statement lie at the heart of the appellant's defence of justification, fair comment and qualified privilege and form issues and questions for the determination of the trial judge in the suit. It was argued that the statement of the trial judge indicate a preconceived view on the part of the judge of persons like the defendants in the five suits which include the appellant. The statement also indicate, according to the appellant, at the very least an apparent prejudgment by the judge of the appellant's claim.

f In reply, the learned respondents' counsel pointed out that the judge's statement as quoted in para. 3 above was based on the open court statement and was confined to the five suits. The respondents urged us not to lose sight of the fact that the defendants in the five suits apologised for their defamatory statements and admitted that their statements were false and untrue. Thus, the judge's statement cannot, argued the respondents, have any bearing to the suit. The respondents further pointed out that the words complained of and attributed to the defendants in the five suits are not the same as the words complained of and attributed to the appellant in the suit. In the circumstances, the learned respondents' counsel submitted that a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have no ground to suspect that a fair trial would not be possible.

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In his judgment, the learned trial judge emphasised that a perusal of his statement would show that it was made purely upon the unreserved apology tendered by the defendants in the five suits. His judgment further stated that his statement was made in the context of the statement in open court. Hence, the trial judge concluded that a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have no basis to suspect that a fair trial would not be possible.

As to the several passages from the learned judges's written judgment quoted in para. 4 above (hereinafter referred to as "the said passages"), it was the contention of the appellant that the trial judge has made very adverse and disparaging remarks and/or findings against Mr. Tommy Thomas. The judge also cast aspersions as to Tommy Thomas' sanity by the choice of the Latin quotation therein. And Tommy Thomas, according to the appellant, is scheduled to be called as his witness at the trial of the suit. In the light of these circumstances, it was argued by the appellant that the said passages in particular and the written judgment in general would give rise to a perception on the part of the public that there would be a real danger that Tommy Thomas' testimony in the suit would not be received with an open mind by the trial judge.

On this Tommy Thomas' issue, the learned trial judge, in his judgment, *inter alia*, said:

Just because he was found guilty of contempt cannot, by any stretch of the imagination, render Tommy Thomas's evidence in this case unacceptable. The truth of what Tommy Thomas will say in evidence will be tested by cross-examination. Evidence will be given and recorded in open Court, and the Court will only decide with an open mind, based on the evidence given.

As to the test for bias, the learned trial judge had rightly and consistent with the appellant's counsel's submission, applied the "real danger test". As to the issue of the application being made orally and without any supporting affidavit, we agree with the appellant that there was no need for affidavit evidence as the application was premised upon court papers and the learned trial judge's written judgment.

On the premise of matters stated in the above paragraphs, we agree, for the reasons stated therein, with the submissions of the learned respondents' counsel, as briefly stated in para. 6 above. We also find that the learned trial judge had not erred in law or in fact when he held as summarised in

a paras 7, 9 and 10 above. The learned judge had also rightly, in his judgment, referred to the case of *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin* [1995] 2 CLJ 900 after which he said:

b Whilst I agree that Gopal Sri Ram JCA made that comment in respect of a comment made by a Judge at an interlocutory stage and that his Lordship had also held that the same Judge may, after expressing a view in the course of an interlocutory proceeding, quite properly after hearing the main action, come to the opposite conclusion, it is my view that the same principle ought to apply to the comment made by me based on the “Statement in Open Court” and which comment therefore cannot in any way amount to a pre-judgment of issues or facts or showing bias, or a real likelihood of bias or a real suspicion of bias.

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We would further say that Gopal Sri Ram JCA’s comment as referred to by the learned trial judge in the above-quoted passage ought to apply too to the judge’s comments on Tommy Thomas in his contempt of court matter. In the circumstances, the appeal had to be dismissed with costs.

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